Supreme Court, U.S.
FILED
JAN 28 2008
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No. 07-843

In The
Supreme Court of the United States

JAMES DRAIN, *et ux.*,

Petitioners,

v.

ACCREDITED HOME LENDERS, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether grant of certiorari is appropriate when two lower courts have found the same facts warranted dismissal as sanctions, and there is no obvious error?

2. Is grant of certiorari appropriate when Petitioners have failed to preserve the issues for appeal and have failed to show where their specific issues were preserved for appeal?

3. Whether grant of certiorari on Petitioners' argument regarding disclosure of medical records is appropriate when that issue is moot?

4. Should certiorari be granted to consider whether the district court and the Tenth Circuit properly applied the Federal Magistrate Act, by permitting a magistrate judge to decide discovery matters and make proposed findings of fact and recommended dispositions on order of reference, all as permitted by the Act?

5. Is there a question worthy of granting certiorari regarding the dismissal of Respondent Mr. Basmajian for ineffective service, when he was never properly served and the case was later dismissed as sanctions anyway?

PARTIES TO THE PROCEEDINGS

Respondents have the following correction to the parties to the proceeding listed by Petitioners:

"Basmajian T. Doyle." To Respondents' knowledge, there is no person with this name. Throughout this litigation Respondents have presumed that Petitioners have meant "Thomas D. Basmajian," a former officer of Fairbanks Capital Corporation.

DISCLOSURE STATEMENT

Respondent Select Portfolio Servicing, Inc. (formerly known as Fairbanks Capital Corp.), is a privately held Utah corporation with its principal place of business in Salt Lake City, Utah. Select Portfolio Servicing is a subsidiary of SPS Holding Corp. During the pendency of the underlying action SPS Holding Corp. was a privately held Delaware corporation owned by each of the PMI Group, Inc., and an affiliate of Financial Security Assurance Holdings Ltd., both of which companies issue shares to the public. On October 4, 2005, Credit Suisse (USA), Inc. (formerly known as Credit Suisse First Boston (USA), Inc.) became the sole stockholder of SPS Holding Corp. Credit Suisse (USA), Inc. is a business unit of Credit Suisse Group, a publicly-traded company.

Respondent Wells Fargo Bank, N.A. (formerly known as Wells Fargo Bank Minnesota, N.A.) is a national banking association owned in its entirety by Wells Fargo & Company, a publicly-traded company.

Respondent Accredited Home Lenders, Inc. is a mortgage company which is a wholly-owned subsidiary of Accredited Home Lenders Holding Co., a publicly-traded company.

ITLA Mortgage Loan Securitization 2002-1, L.L.C. is not a party to this litigation, but it holds the mortgage and loan at issue in this litigation. ITLA Mortgage Loan Securitization 2002-1, L.L.C. is wholly owned by ITLA Capital Corporation, a publicly-traded company. Pursuant to an Indenture dated as of March 1, 2002 by and between ITLA Mortgage Loan

Securitization 2002-1, L.L.C., as issuer, and Wells Fargo Bank, N.A. (listed above), Wells Fargo Bank, N.A., was named as trustee of the trust created thereby. Wells Fargo Bank, N.A. has no ownership interest of any kind in ITLA Mortgage Loan Securitization 2002-1, L.L.C.

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OPINIONS BELOW

None of the lower court opinions in this case have been reported. The sequence of orders and their unofficial citations are as follows:

Proposed Findings and Recommended Disposition, *Drain v. Wells Fargo Bank*, No. 04cv399 MV/KBM (D.N.M. December 16, 2005). The magistrate judge was acting on order of reference when she entered these Proposed Findings and Recommended Disposition, reproduced at Petitioners' Appendix (hereafter "App.") 43 to 76, in which she made findings of fact regarding the conduct of Petitioners and Petitioners' counsel, recommended dismissal as discovery sanctions, and recommended additional sanctions against Petitioners' counsel.

The district judge then entered Amended Memorandum Opinion and Order, *Drain v. Wells Fargo Bank*, No. 04cv399 MV/KBM (D.N.M. March 2, 2006). This Amended Memorandum Opinion and Order, reproduced at App. 11 to 42, conducted a *de novo* review of the record and then adopted in part and rejected in part the December 16, 2005 Proposed Findings and Recommended Disposition. (App. 43 to 76) In doing so the district judge made additional findings of fact, and then dismissed the case as discovery sanctions and imposed additional personal sanctions against the Petitioners' counsel. The District Court then entered Memorandum Opinion and Order, *Drain v. Wells Fargo Bank*, No. 04cv399 MV/KBM (D. N.M. March 28, 2006), reproduced at Respondents' Joint Appendix (hereafter "Resp. App.") 37b to 38b, which clarified that the March 2, 2006 order

dismissing the Petitioners' claims with prejudice did not dismiss Respondents' counterclaims. The district court then entered Respondents' stipulation of dismissal of counterclaims without prejudice.

Petitioners appealed the March 2, 2006 order of dismissal to the Tenth Circuit, which eventually entered Order and Judgment, *Drain v. Accredited Home Lenders Inc.*, No. 06-2096, 219 Fed. Appx. 791, 2007 WL 756438 (10th Cir. March 14, 2007) *reh'g denied* (10th Cir. May 3, 2007). This Order and Judgment, reproduced at App. 1 to 10, reviewed the facts contained in the record and then affirmed both the district court's dismissal of Petitioners' case as sanctions and the sanction of Petitioners' attorney. The denial of rehearing *en banc* is reproduced at App. 77 to 78. This is the order on appeal to this Court.

Following entry of the order affirming the district court's dismissal, the Tenth Circuit then entered Order, *Drain v. Accredited Home Lenders Inc.*, No. 06-2096 (10th Cir. May 3, 2007), in which it found Petitioners' appeal objectively frivolous and that Petitioners' counsel had multiplied the proceedings unreasonably and vexatiously. The Order imposed sanctions upon Petitioners' counsel. This order is reproduced at Resp. App. 14b to 16b.

STATEMENT OF JURISDICTION

In addition to the contents of Petitioners' Statement, Respondents state that Petitioners appear to be questioning the constitutionality of Section 636 of the Federal Magistrate Act, 28 U.S.C.A. §§ 631 to 639 (West 2002). In this regard, Petitioners have not

complied with Supreme Court Rule 29.4(b) requiring service upon the Solicitor General of the United States.

Furthermore, despite advancing similar arguments in this matter regarding the constitutionality of 28 U.S.C.A. § 636 (West 2000) in the lower courts, Petitioners failed to request those courts comply with 28 U.S.C. § 2403(a) (2006) requiring certification to the United States Attorney General. Since Petitioners have raised the question of constitutionality, they bear the burden of assuring compliance with the requirement. *See, e.g., Kealey Pharmacy & Home Care Servs., Inc. v. Walgreen Co.*, 761 F.2d 345, 350 n.8 (7th Cir. 1985). Nevertheless, noncompliance with the statute has not deprived the lower courts of jurisdiction to reject Petitioners' argument. *Tonya K. by Diane K. v. Bd. of Educ. of City of Chicago*, 847 F.2d 1243, 1247 (7th Cir. 1988); *see also Wallach v. Lieberman*, 366 F.2d 254, 258 (2d Cir. 1966).

STATUTES AND RULES INVOLVED IN THIS CASE

United States Constitution, article III

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

* * *

United States Constitution, amendment I[1]

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, amendment V[2]

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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[1] Petitioners claim violation of their rights to privacy under the First Amendment.

[2] Petitioners simply claimed violation of due process rights. *See, e.g.*, Petition 10. Respondents infer Petitioners mean violation of their Fifth Amendment right to due process.

28 U.S.C.A. § 636 (2002)[3]. Jurisdiction, powers, and temporary assignment.

* * *

(b)(1) Notwithstanding any provision of law to the contrary--

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for

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[3] 28 U.S.C.A. § 636 (2002) was amended on September 9, 2005 by the Federal Judiciary Emergency Special Sessions Act of 2005, Section 2(d) of Public Law 109-63, which made changes to subsection (a) but did not amend the cited subsection.

posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

Federal Rule of Civil Procedure Rule 4. Summons. (2000)[4]

* * *

(c) Service with Complaint; by Whom Made.
(1) A summons must be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint.

* * *

(d) Waiver of Service; Duty to Save Costs of Service; Request to Waive.
(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.
(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request

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[4] Federal Rule of Civil Procedure 4 was amended effective in December 1, 2007. The amendments made numerous changes.

that the defendant waive service of a summons. The notice and request

(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid of means of compliance in writing.

If a defendant located within the United States fails to comply with a request for waiver made

by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendants unless good cause for the failure be shown.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the Untied States.

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(e) Service Upon Individuals Within a Judicial District of the United States. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

* * *

(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law; service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(c)(i) thereof.

* * *

(k) Territorial Limits of Effective Service.

(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant

(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or

(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place in which the summons issues, or

(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or

(D) when authorized by a statute of the United States.

(2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

(l) Proof of Service. If service is not waived, the person effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof. Proof of service in a place not within any judicial district of the United State shall, if effected under paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention, and shall, if effected under paragraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

* * *

District of New Mexico Local Rule of Civil Procedure 26.3-Required Disclosures (2001)[5]

All provisions of Fed. R. Civ. P. 26 are applicable to actions in this District, unless specifically exempted by local rule.

(a) Exemptions from Initial Disclosures. The following are exempted:

(1) all disclosures in cases excluded from case management procedures by D.N.M.LR-Civ. 16.3; and

(2) disclosure of experts having knowledge of the case who are used for the sole purpose of case preparation and not as witnesses.

(b) Exemption from Expert Report Disclosure. Treating physicians need not prepare an expert report as required by Fed. R. Civ. P. 26(a)(2)(B).

(c) Exemption When Initial Pretrial Report Filed. When required disclosures have previously been made in an Initial Pretrial Report pursuant to D.N.M.LR-Civ. 16.1. the required disclosures pursuant to Fed. R. Civ. P.26 may incorporate portions of the Initial Pretrial Report.

(d) Required Initial Disclosures. In all cases in which the physical or mental medical condition of a party is an issue, the party whose conditions is an issue must make a good faith effort to produce the following information that the disclosing party may use to support its

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[5] This rule was amended effective March 3, 2007.

claims or defenses, unless solely for impeachment:

(1) a list of the name, address and phone number of any healthcare provider, including without limitation, any physicians, dentists, chiropractors, mental health counselors, clinics and hospitals which have treated the party within the last 5 years preceding the date of the occurrence set forth in the pleadings;

(2) all records of such healthcare providers which are already in that party's possession;

(3) for each healthcare provider, a signed authorization to release medical records form, as set forth in Appendix "A". Within 10 days after receiving medical records by use of these authorization forms, a party must sequentially number each record received and produce, at that party's expense, complete copies of all numbered records to all other parties.

(e) Duties in Responding to Initial Disclosures. When information, records or a release subject to this rule is withheld on a claim that is privileged or subject to objection, or that disclosure is prohibited by regulation or statute, the claim must be made expressly in writing and must be supported by a description of the nature of the documents, or things not produced that is sufficient to enable the demanding party to contest the claim.

COUNTERSTATEMENT OF THE CASE

The district court dismissed Petitioners' case as discovery sanctions due to the misconduct of Petitioners and their counsel. The order of dismissal also imposed additional personal sanctions against Petitioners' counsel.[6] In imposing these sanctions, the district court found that Petitioners had committed numerous discovery violations and that Petitioners' counsel made unfounded accusations against opposing counsel and the court, filed false certificates of service, lacked familiarity with court procedure, lacked familiarity with rules regarding service of process,

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[6] The district court imposed monetary sanctions against Petitioners' counsel. The district court's order references entry of an order that he show cause to a three judge panel why his federal bar privileges should not be revoked. (App. 40-41 n. 8) This order to show cause was filed in an independent district court proceeding. *In re Bello*, No. 2006-misc-06 (D.N.M. Jan. 25, 2006) (reproduced at Resp. App. 39b to 40b). Based on Petitioners' counsel's conduct in this case and one other case the district court panel temporarily suspended Petitioners' counsel from practice. *In re Bello*, No. 2006-misc-06 (D.N.M. June 6, 2006) (reproduced at Resp. App. 17b to 30b). This suspension was upheld on appeal. *In re Bello*, No. 06-2199, 237 Fed. Appx. 363, 2007 WL 1821034 (10th Cir. June 26, 2007) (reproduced at Resp. App. 6b to 13b). The district court panel then entered an order indefinitely suspending Petitioner's counsel from practice. *In re Bello*, No. 2006-misc-06 (D.N.M. Oct. 18, 2007) (reproduced at Resp. App. 3b to 5b) The Tenth Circuit has recently ordered Petitioners' counsel to show cause why he should not be suspended from practice in the Tenth Circuit as well. *In re Bello*, No. 07-821 (10th Cir. Nov. 19, 2007) (reproduced at Resp. App. 1b to 2b)

intentionally mis-cited and misrepresented legal precedent, and consistently failed to follow court rulings. (App. 14 to 32) The misconduct of Petitioners' counsel persisted at the appellate court level, prompting the Tenth Circuit to state:

> [W]e are disturbed that [Petitioners' counsel] continues to cite cases even after the district court pointed out his error. For example, he cites *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999) for the proposition that "[i]t is well settled that service of summons and complaints on attorneys for a Defendant is sufficient." As the district court noted, *Murphy Bros.* addresses when the thirty-day time period for removal begins, not the proper method for service.

(App. 9 – 10) Petitioners' counsel cited the *Murphy Brothers* case in the Tenth Circuit appeal to advance one of the first of three points he argued on appeal: whether a corporate officer can be served by mailing process to his corporate office or its attorney. The other two points he argued on appeal were: whether a local district court rule which requires medical disclosures is unconstitutional; and whether magistrate judges can hold hearings and issue recommendations without the parties' consent. (App. 9)

As the Tenth Circuit found, "In addition to being fundamentally incorrect, these points are entirely irrelevant. The questions before us are whether the district court abused its discretion in dismissing [Petitioners'] case and fining [Petitioners' counsel]." (App. 9)

Petitioners are now *pro se*, but in their p tition they have advanced the same irrelevant points and have cited *Murphy Brothers* for the same incorrect proposition. (Petition 20) There, as here, the only issue properly before the Court is whether the district court abused its discretion in dismissing the case as discovery sanctions.

I. Conduct Leading to the District Court's Dismissal

The course of events which ultimately led to dismissal began shortly after Petitioners' Complaint was filed. In their suit, Petitioners claimed that Respondents violated a variety of federal and state consumer protection acts in the handling of Petitioners' home loan, which resulted in damages including emotional distress and pain and suffering. Subject matter jurisdiction of the United States District Court for the District of New Mexico was premised on federal question jurisdiction pursuant to 28 U.S.C. § 1331 (2006), due to the allegations of violation of the Truth in Lending Act, 15 U.S.C. §§ 1601 to 1667f (2000), the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 to 1681x (2000), the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 to 1692o (2000), and the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 1831b, 2601-2610, and 2614-2617 (2000).[7] Respondents Wells Fargo and Fairbanks

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[7] Petitioners below and here have also alleged that Respondents Fairbanks and Wells Fargo violated an order they had entered into with the Federal Trade Commission. (*See, e.g.*, Petition 5) In addition to the lack of any evidence in the record showing that the

counterclaimed for debt and money due on the note and foreclosure of the mortgage.

The conduct of Petitioners' counsel can be broken generally into four strings of issues and events. These strings culminated in a four-hour evidentiary hearing before Magistrate Judge Molzen acting on order of reference to consider numerous motions for discovery sanctions under Rule 37, Rule 11 sanctions, and to compel, all filed by Respondents. (App. 43-45) Each string of events served as a basis for dismissal of the case as sanctions. The strings are: (1) Petitioners' counsel's failure to understand and comply with the rules regarding service of process; (2) Petitioners' counsel's refusal to submit to the law and rules regarding federal magistrate judges; (3) Petitioners' and their counsel's refusal to comply with requirements concerning initial disclosures and discovery; and (4) misrepresentations to the court by Petitioners' counsel.

II. Events Regarding Service of Process

The first primary string of issues and events involves Petitioners' counsel's refusal to understand the basic rules of civil procedure regarding service of

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order applies to Petitioners or that Respondents' conduct in relation to Petitioners was actually proscribed by the FTC order, any alleged violation of the order could not serve as a basis for this suit as it was filed in April 2004 (App. 2) while the FTC order was entered in May 2004 (Petition 5). Moreover, the Petitioners' remedy for any alleged violation of the FTC order lies not in this suit, but rather with the court that issued the order.

process. Petitioners' counsel claimed that service by mail upon Respondent Mr. Basmajian was complete upon mailing of process to Mr. Basmajian's former employer and to that employer's attorneys.[8] However, nothing in the record shows that Mr. Basmajian ever consented to service by mail, consented to service on attorneys for his former employer, or that he was ever personally or constructively served. Nevertheless, Petitioners' counsel initiated a barrage of filings and motions regarding service on Mr. Basmajian.

The district court summarized the dispute regarding purported service on Mr. Basmajian in its findings and concluded that it began when Petitioners' counsel requested entry of default against Mr. Basmajian on October 6, 2004. (App. 29) The district court clerk refused to enter default, noting in the docket that no effected service had been returned. (*Id.*) Mr. Basmajian then entered an appearance and moved for dismissal due to lack of service of process and lack of personal jurisdiction. (*Id.*) Petitioners' counsel opposed the motion and filed a second motion for default judgment. (*Id.*) On January 14, 2005, the district court entered a Memorandum Opinion and Order finding that Petitioners had failed to effect proper service on Mr. Basmajian within the time provided by law and that they failed to show good cause for their failure to effect proper service. The district court thus dismissed Mr. Basmajian without prejudice. (*Id.*)

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[8] Petitioners' counsel made this same argument at the Tenth Circuit, and Petitioners have raised it in their petition for writ of certiorari.

Petitioners' counsel then moved for reconsideration or vacation of the order dismissing Mr. Basmajian on January 26, 2005, claiming it was based on misrepresentations of facts and law by Respondents. (App. 30) The magistrate judge entered a Proposed Findings and Recommended Disposition recommending the motion be denied (App. 4), to which the Petitioners never filed an objection. The district court then entered a Memorandum Opinion and Order on June 21, 2005, finding the Motion for Reconsideration to be unsupported and without basis and that Petitioners' counsel did not understand how to effectuate service. (App. 30) The court then denied the Motion for Reconsideration. (App. 30)

Prior to the district court's entry of the order denying the motion for reconsideration, Petitioners' counsel petitioned for a writ of mandamus on the service issue, which was denied by the Tenth Circuit (App. 31) (referring to *Drain v. Wells Fargo Bank*, *appeal docketed* No. 05-2080 (10th Cir. March 29, 2005), *appeal denied* (10th Cir. April 5, 2005)).

There is no record that Petitioners' counsel ever made any other attempt to serve Mr. Basmajian.

The continual litigation on the service issue was one of the bases for which Respondents sought sanctions. The magistrate judge's Proposed Findings and Recommended Disposition only briefly reviewed the service issue, finding that Petitioners had twice sought entry of default against Mr. Basmajian, but were unsuccessful because he had not been properly served. (App. 61) The magistrate judge recommended

sanctions against Petitioners' counsel for his conduct (App. 71-73).

The chief district judge reviewed the magistrate judge's Proposed Findings and Recommended Disposition and conducted a *de novo* review of the entire record. (App. 13-14) The chief district judge then expanded on the magistrate judge's findings regarding the facts and circumstances regarding service on Mr. Basmajian (App. 29 to 31), and based on this review found that Petitioners' counsel's litigation of the service issue "demonstrated an inability to comprehend how parties are served under the Federal Rules of Civil Procedure and refused to accept the Court's determination that Defendant Basmajian had been improperly served." (App. 29) The district judge then imposed various sanctions under Rule 11 and 28 U.S.C. § 1927 (2000). (App. 41 to 42)

When it reviewed the case, the Tenth Circuit gave a synopsis of the facts regarding service on Mr. Basmajian which reiterated the district court's findings of fact in all material respects. (App. 3 to 4) The court then affirmed the district court's order, finding that the district court did not abuse its discretion in imposing Rule 11 sanctions against Petitioners' counsel. (App. 9)

III. Events Regarding Continual Objections to Magistrate Judge Participation

The next string involves Petitioners' counsel's refusal to understand the law and procedures which allow magistrate judges to participate in various aspects of a case. Following court procedure as

described in 28 U.S.C. § 636, Federal Rules of Civil Procedure 72 and 73, and District of New Mexico Local Rule of Civil Procedure 73.1, upon filing of the complaint the case was temporarily assigned to Magistrate Judge Leslie C. Smith to act as the presiding judge by designation and to Magistrate Judge Karen B. Molzen to act as the magistrate judge for reference and discovery purposes. (App. 2 to 3) The court clerk then sent a letter seeking consent to proceed before a magistrate judge to Petitioners' counsel. (App. 3) Several Respondents filed Motions for More Definite Statement or Dismissal. Before the magistrate consent form was returned, the motions were acted upon by the magistrate judge sitting by designation. (*Id.*) Magistrate Judge Smith, sitting by designation, granted the Motions for More Definite Statement but denied the Motions to Dismiss. (*Id.*) No party objected. (*Id.*) Petitioners filed an amended complaint which again drew motions to dismiss from Respondents, and which were denied by Magistrate Judge Smith sitting by designation. (*Id.*) Again, no party objected. (*Id.*) Then, because Petitioners' counsel refused to consent to proceeding before a magistrate judge sitting by designation, the case was randomly reassigned from Magistrate Judge Smith to Chief District Judge Martha Vázquez. (*Id.*) The magistrate judge for reference and discovery purposes, the Honorable Karen B. Molzen, remained the same. (*Id.*) As a result of Chief District Judge Vázquez's entry of an Order of Reference pursuant to 28 U.S.C. § 636(b)(1)(B), Magistrate Judge Molzen was also designated to conduct hearings, perform legal analysis and recommend ultimate disposition of any pending motion. (App. 3) Following District of New Mexico Local Rule of Civil Procedure 16.2 the parties were

ordered to a settlement conference conducted by the discovery magistrate judge.

Petitioners' counsel filed an objection to the order of reference requesting that it be withdrawn as unconstitutional because Petitioners did not consent to proceed before a magistrate judge. (App. 26) As the district court later found, Petitioners' counsel then proceeded to object to virtually every single discovery order, finding of fact or recommendation entered by the magistrate judge, claiming she lacked jurisdiction to act. (App. 28 to 29) Similar objections regarding a magistrate judge's jurisdiction were even raised to discovery orders entered by the magistrate judge. (App. 29)

In her June 21, 2005 Memorandum Opinion and Order, Chief District Judge Vázquez addressed Petitioners' counsel's continuous objections to the participation of a magistrate judge and reviewed the statutory basis for referring matters to a magistrate judge. (App. 26 to 29) As the district court found:

> Referring a matter to a magistrate judge to propose findings of fact and recommended disposition does not require the consent of the parties. *See Garcia v. City of Albuquerque*, 232 F.3d 760, 766 (10th Cir. 2000) ("28 U.S.C. § 636(b)(1)(B) does not require the consent of the parties").
>
> *If [Petitioners'] counsel had conducted any legal research, or even read the statute, he would have discovered that his argument was contrary to the plain language of the statute and Tenth Circuit caselaw. [Petitioners'] position is wholly*

> *without legal merit* and [Petitioners'] objections to the Order of Reference, which is actually a motion for reconsideration, and [Petitioners'] motion to vacate will be denied.
>
> [Petitioners] are hereby cautioned that frivolous arguments may subject [Petitioners] and/or their counsel to Rule 11 sanctions. . . .

(App. 27)(Emphasis added.) Despite this caution Petitioners' counsel continued to claim the magistrate judge lacked jurisdiction to enter proposed findings and recommended dispositions. (App. 29) The district court found this conduct, especially following multiple rulings on the issue, to be another demonstration of Petitioners' counsel's "complete lack of understanding of federal civil procedure and [refusal] to follow the Court's direction and orders clarifying the applicable law and procedure." (App. 25) The district court then imposed sanctions against Petitioners' counsel under Rule 11 and 28 U.S.C. § 1927. (App. 41 to 42)

When it reviewed the matter on appeal, the Tenth Circuit gave a synopsis of the facts regarding Petitioners' counsel's objections concerning participation by the magistrate judge and did not differ with the district court's findings of fact in any material respect. (App. 4 to 5) The Tenth Circuit affirmed the dismissal finding the district court did not abuse its discretion in imposing sanctions. (App. 9)

IV. Events Regarding Initial Disclosures and Discovery

The third string of events involves Petitioners and their counsel's refusal to comply with initial disclosure

and discovery requirements. While discovery violations were a major factor leading to sanctions of dismissal by the district judge, the only argument on this topic ever raised by Petitioners (and even now in their petition for writ of certiorari (Petition 11 to 16)) was that their medical records should not be provided with their initial disclosures. However this particular issue is moot as the district judge expressly excluded it as a basis for imposing sanctions and instead relied on numerous other discovery violations by Petitioners. (App. 20)

The initial disclosure of medical records and releases had been important because Petitioners sought damages for emotional distress and pain and suffering, but failed to supply medical record releases with their initial disclosures as required by local rule and subsequent court order. (App. 17 and 47) When they still failed to produce the releases Respondents moved to compel the required initial disclosures. (App. 18 and 48) Petitioners responded by claiming that their physical or mental conditions were not at issue in the lawsuit and that the local rule violated their "rights under the first amendment of the United States Constitution and their privacy rights under New Mexico laws." (App. 18) The magistrate judge rejected their argument and granted the motion to compel, to which Petitioners filed an objection followed by a Motion for Protective Order. (*Id.*) Petitioners did not seek a stay of the order compelling delivery of the medical releases. (*Id.*) The district court denied the motion for protective order and ordered the releases be produced. (*Id.*) In violation of both the magistrate judge and district judge's orders, Petitioners never

produced the medical releases or any medical information. (App. 19)

However, the disposition of the initial disclosure of medical records and releases is entirely irrelevant since the district judge rejected that as a basis for dismissing the case. (App. 20) This rejection establishes the district judge did not fully adopt in full the magistrate judge's Proposed Findings and Recommended Disposition, but rather conducted an independent review. Indeed, the magistrate judge found that Petitioners had "willfully failed to provide the medical information and releases" and then recommended dismissal as sanctions, in part, on that basis. (App. 50) The district judge expressly disagreed with the magistrate judge's recommendation on that particular point. (App. 20)

The district judge instead concluded dismissal as discovery sanctions was appropriate because of Petitioners and their counsel's persistent refusal to comply with written discovery and for their non-appearance at depositions. (App. 14 to 15) Both the magistrate judge and district judge found that on numerous occasions the Petitioners refused to provide discovery responses, requiring Respondents to file motions to compel virtually every response. (App. 14 to 15, and 51) In this regard the magistrate judge found Petitioners' responses were "untimely, incomplete, evasive, and, at times, nonsensical." (App. 15) On June 17, 2005, Magistrate Judge Molzen entered an order compelling full discovery responses. (*Id.*) Petitioners never complied. (*Id.*)

Respondents also moved for discovery sanctions due to Petitioners' failure to appear at their properly-noticed depositions. (App. 15 to 16)

In light of the numerous, willful and persistent discovery violations, the magistrate judge determined Rule 37 sanctions were necessary. (App. 66) The district judge, in her detailed Memorandum Opinion and Order conducted a *de novo* review of the record and ultimately concurred in this determination. (App. 32) The magistrate judge and the district judge both conducted reviews of the five factors established by the Tenth Circuit in *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992), in order to assess the appropriate sanction to be imposed. (App. 32 and 66)

The magistrate judge first assessed the degree of actual prejudice to Respondents, and in doing so found that "the discovery process had been thwarted at every turn" (*id.*) and that Petitioners' counsel had "unreasonably and vexatiously multiplied the proceedings in this case thereby significantly and needlessly increasing the costs of litigation." (App. 66 to 67) The district judge found similarly. (App. 33)

The magistrate judge next assessed the amount of interference with the judicial process caused by Petitioners' counsel and found that it had "never before seen the degree to which [Petitioners'] counsel obstructed the orderly progression through the discovery phase." (App. 67) The magistrate judge then concluded that:

> Looking at all the . . . instances of [Petitioners'] conduct during discovery, I can say without

> hesitation that they have substantially interfered with the judicial process to the detriment of not only the parties but the courts. Judges of both the trial and appellate court have had to expend considerable resources to address the unreasonable actions of [Petitioners'] counsel with little success in moving this case through the litigation process.

(App. 68 to 69) The district judge agreed, finding that "[t]his case has consumed an inordinate amount of judicial time," (App. 34) and that "the difficulty in the case was not ignorance but a deliberate attempt by [Petitioners] to obstruct the orderly progression of this case." (*Id.*)

Third, the magistrate judge assessed the culpability of Petitioners and found that their failures were not through inadvertence or excusable neglect, but instead "a deliberate unwillingness to accept those responsibilities based upon an intransigent belief that the court's reading of the rules and laws is erroneous." (App. 69) The district judge concurred, and stated that "[w]hile [Petitioners' counsel] is the person who directed the course taken by [Petitioners], a litigant is bound by the actions of its attorney, and the relative innocence of the litigant in the failure does not constitute grounds for relief." (App. 35) The district judge also noted that despite the court's warnings, Petitioners continued to employ their counsel. (App. 37)

Fourth, the magistrate judge assessed whether advance warnings had been given to Petitioners and found that both the magistrate judge and district judge

had directly cautioned them. (App. 70) The district judge also found they were warned numerous times that sanctions, including dismissal, could be imposed for their counsel's making of frivolous arguments and their failure to comply with court orders and discovery obligations. (App. 37)

Last, the magistrate judge considered whether lesser sanctions would be effective and concluded that given Petitioners' counsel's conduct in this case and in another of his cases in which dismissal for discovery sanctions had also recently been imposed, no sanction less than dismissal would deter future discovery abuses by him. (*Id.*) The district judge agreed, finding that "[Petitioners] have shown a pattern and practice of disregarding Court orders, their discovery obligations and applicable rules. Further [Petitioners] do not acknowledge any of these failures but, instead, resort to baseless attacks upon opposing counsel and the court." (App. 38)

The magistrate judge then recommended the district judge dismiss the case as Rule 37 sanctions. (App. 75) The district judge concurred, concluding "after considering all the relevant factors, dismissal alone would satisfy the interests of justice." (App. 38)

When it reviewed the imposition of Rule 37 sanctions for abuse of discretion, the Tenth Circuit also conducted an *Ehrenhaus* analysis and stated:

> [A]fter a thorough review of the record and the briefing, we substantially agree with the district court's characterization of [Petitioners' counsel and Petitioners'] malfeasance. The district court

> properly considered the *Ehrenhaus* factors in this case . . .. We conclude that the district court did not abuse its discretion in dismissing [Petitioners'] case.

(App. 7 to 8)

V. Petitioners' Counsel's Misrepresentations to the Court and Conduct Toward Both the Court And Opposing Counsel

The last string of events involves the conduct of Petitioners' counsel, which led to the court imposing personal sanctions against him. In the Motion for Sanctions, Respondents complained of Petitioners' counsel's misrepresentations of case law in court filings, making of baseless allegations of misrepresentation and bias against both the District Court Clerk and counsel for Respondents, misrepresentation of the dates on which Petitioners' counsel placed items in the mail for service, misrepresentation regarding whether conferences to determine opposition to motions have taken place, all of which caused an unreasonable and vexatious multiplication of the proceedings. (App. 12)

When considering these accusations, the magistrate judge found "a pattern and practice by [Petitioners' counsel] of falsely certifying the actual date of mailing" on items for which he was signing certificates of service. (App. 59) The magistrate judge also found that even a cursory look at Petitioners' counsel's pleadings showed they were laden with unjustified legal conclusions, ignored favorable precedent, and showed

a lack of familiarity with the law. (App. 59 to 60) She further found that Petitioners' counsel ignored and blatantly disregarded court orders (App. 60 to 61) and made frivolous arguments. (App. 61 to 62) In addition, the magistrate judge found Petitioners' counsel made groundless and unfounded claims of bias and unfair treatment by the presiding judge and referral magistrate judge, which exhibited a lack of respect for the judicial system. (App. 64) She concluded this conduct warranted sanctions against Petitioners' counsel. (App. 71 to 75)

In her *de novo* review the district judge found similar conduct by Petitioners' counsel (App. 20 to 25), and concurred in the magistrate judge's recommendation that Rule 11 sanctions be imposed. (App. 40 to 41)

In their appeal to the Tenth Circuit, Petitioners did not expressly seek review of the sanctions against their counsel (App. 9 (recounting points raised by Petitioners); nevertheless the Tenth Circuit reviewed the record and held the district court did not abuse its discretion in imposing sanctions under Rule 11. (*Id.*)

REASONS TO DENY THE PETITION

I. Two Courts Have Found the Same Facts Warranted Dismissal as Sanctions, and There is No Obvious Error.

Certiorari should not be granted because the lower courts have been in agreement as to the facts and that sanctions were appropriate. The magistrate judge proposed findings of fact and based on those findings

recommended sanctions be imposed. The district judge, after conducting a *de novo* review, made her own findings of fact which were in accord with the magistrate judge's findings. The district judge dismissed the case as Rule 37 sanctions based on her findings of fact. The Tenth Circuit then reviewed the record and neither found any obvious errors in the facts found by the district court nor did it set aside any of the district court's findings. When two courts below have agreed on the facts, this Court traditionally gives deference to those findings and does not review concurrent findings of fact by those two lower courts without a very obvious and exceptional showing of error. *See United States v. Ceccolini*, 435 U.S. 268, 273 (1978); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). No such errors have been shown to exist here, and further review by this Court is unnecessary.

II. Petitioners Have Failed to Preserve the Issues For Appeal and Have Failed To Show Where Their Specific Issues Were Preserved For Appeal.

Petitioners fail to cite any references to the record where their specific issues are preserved. Moreover, as the Tenth Circuit Court of Appeals pointed out, the issues being advanced by Petitioners' counsel are entirely irrelevant: they were not the basis for dismissal and were not the basis for the Tenth Circuit's affirmance. Indeed, Petitioners have never challenged the district court's findings regarding Petitioners' and their counsel's sanctionable conduct, or the district court's imposition of sanctions based on that conduct. Because the issues Petitioners seek to

have reviewed have not been considered by the Tenth Circuit and are not squarely presented to this Court, the petition for writ of certiorari should be denied. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

In addition, of the issues they are attempting to advance here, Petitioners have twice failed to preserve the issue of service of process on Mr. Basmajian. First, Petitioners failed to file a response to Mr. Basmajian's Motion to Dismiss. Second, Petitioners failed to object to the magistrate judge's recommendation that their Motion to Reconsider of Dismissal of Mr. Basmajian be denied.

III. Petitioners' Argument Regarding Disclosure of Medical Records Is Moot.

Petitioners are attempting to appeal the district court's local rule requiring that medical information and releases be provided with initial disclosures. D.N.M. Civ. R. 26.3. This argument is moot since the District Court specifically stated that disclosure of medical records was not a basis for the dismissal as sanctions. Therefore, Petitioners' argument relating to the requirement to provide medical information and releases under the rule is moot.

Regardless, even if the district court had not excluded the medical records from the dismissal, the myriad of other facts regarding Petitioners' conduct in discovery show that there were abundant reasons to dismiss the case as sanctions. In this regard, both the district court and Tenth Circuit considered the five-factor test identified in *Ehrenhaus v. Reynolds*, 965

F.2d 916, 921 (10th Cir. 1992), to determine whether sanctions of dismissal under Rule 37 were appropriate. The five factors are (1) the degree of actual prejudice to the opposing party; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would likely be taken as a sanction for non-compliance; and (5) the efficacy of lesser sanctions. *Id.* at 921. The district court concluded the factors were met and dismissal was appropriate, and the Tenth Circuit affirmed on this basis.

IV. The District Court and the Tenth Circuit Properly Interpreted and Applied the Federal Magistrate Act, Which Permits Magistrate Judges to Decide Discovery Matters and Also Make Proposed Findings of Fact and Recommended Dispositions on Order of Reference.

The plain language in the statute authorizing magistrate judges to be referred matters for handling of hearings, proposing findings of fact and recommending disposition does not require the consent of the parties. 28 U.S.C. § 636(b)(1)(B). Nor does the statute require consent of the parties for an order of reference. *See Garcia v. City of Albuquerque*, 232 F.3d 760, 766 (10th Cir. 2000) ("28 U.S.C. § 636(b)(1)(B) does not require the consent of the parties."). Here, there is no evidence in the record that the district court improperly applied the statute when it entered the Order of Reference, that the magistrate judge abused or exceeded the power conferred in the Order

of Reference, or that the district court improperly interpreted the statute when considering any of Petitioners' various motions contesting the Order of Reference or magistrate judge's exercise of power under that statute.

V. The Dismissal of Respondent Mr. Basmajian For Ineffective Service Is Not At Issue Because He Was Never Properly Served and The Case Was Later Dismissed As Sanctions Anyway.

Petitioners have never shown that they complied with the rules of civil procedure to effect proper service upon Mr. Basmajian, and cannot show his dismissal from the lawsuit was inappropriate. Federal Rule of Civil Procedure 4 states that a defendant may be served in a manner specified in the rules, in a manner authorized in the state in which the district court is located, or in a manner authorized in the state in which service is effectuated. Fed. R. Civ. P. 4(e) (2000).

Petitioners have never shown that they effected service in compliance with the rule. Indeed, while they continually claim to have effectively served Mr. Basmajian by mail, they have never cited the rule of any court or a case from any jurisdiction which supports their position that merely sending certified mail to his former employer or that employers' attorney is sufficient.

While Federal Rule of Civil Procedure 4(d) does contemplate service by mail, such service must be accompanied by a request that the defendant waive service of a summons. *See* Fed. R. Civ. P. 4 (c) & (d)

(2000). Here, while the record shows Petitioners mailed process to Mr. Basmajian at his former employer's address, absent from the record is any showing that Petitioners either provided Mr. Basmajian with a waiver of service form or otherwise requested that he execute a waiver of service. Absent a waiver of service of a summons by mail, a plaintiff must effect personal service of the complaint and summons on him. *See* Fed. R. Civ. P. 4(d) (2000). Nothing in the record shows that Petitioners ever purported to personally serve Mr. Basmajian.

Since Federal Rule of Civil Procedure 4(m) imposes a time limit of 120 days within which a plaintiff must serve a defendant, the district court properly found that Petitioners' failure to serve Mr. Basmajian within the time period necessitated dismissal under Rule 12(b)(5). *See In re Kirkland (Broitman v. Kirkland)*, 86 F.3d 172, 174 (10th Cir. 1996) (stating that the rule "requires the court to dismiss a proceeding if service has not been made upon the defendant within 120 days after filing and the party responsible for service cannot show good cause why it was not made").

While Petitioners could have avoided this dismissal if they had actually served Mr. Basmajian or shown good cause for their failure to serve him, they never argued good cause as a reason for their failure – instead they have steadfastly claimed that service by mail alone was appropriate. The district court's dismissal of Mr. Basmajian was mandatory because Petitioners failed to show actual service or good cause why service had not occurred. *See id.* at 174. The

district court's compliance with mandatory rules of civil procedure is not an abuse of discretion.

Regardless, the dismissal of Mr. Basmajian had no impact on the district court's decision to dismiss Petitioners' case as discovery sanctions, and even if the district court's dismissal of Mr. Basmajian had been improper, this Court may still affirm the district court's judgment and the Tenth Circuit's affirmance because the ultimate result – dismissal of Petitioners' case as a discovery sanction – was correct. *J.E. Riley Inv. Co. v. Comm'r of Internal Revenue*, 311 U.S. 55, 59 (1940) (holding affirmance is justified when the result from the lower court was correct for an entirely different reason).

CONCLUSION

For the foregoing reasons, Respondents ask that this Court deny the petition for writ of certiorari.

Respectfully Submitted,

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DATED: January 28, 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 07-821

[Filed November 19, 2007]

IN RE:	)
GANY M. BELLO	)
	)

ORDER

November 19, 2007

This court has been advised by order of the U.S. District Court for the District of New Mexico that attorney Gany Mike Bello has been suspended from the practice of law in that court, with certain exceptions and conditions on his practice. Mr. Bello may show cause in writing within 20 days of the date of this order why he should not be similarly suspended in this court. If a response is filed, it must include a declaration of the other bars to which the attorney is admitted. Failure to file a response constitutes acquiescence in the imposition of reciprocal discipline by this court.

A copy of the court's Plan for Attorney Disciplinary Enforcement can be found at the court's

website–www.ca10.uscourts.gov–by selecting the Rules, Forms & Jury Instructions tab and opening the most recent version of our rules.

Entered for the Court
CLERK, COURT OF APPEALS

/s/_____

By:
Douglas E. Cressler
Chief Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MISCELLANEOUS NO.: 2006-06

[Filed October 18, 2007]

IN RE: THE MATTER OF)
GANY MIKE BELLO, ESQ.)
)

ORDER

THIS MATTER came before the Court on: (i) the Court's Notice of Order to Show Cause and Order to Appear, Misc. No. 2006-06, filed April 12, 2006; and (ii) Respondent's Motion for Preliminary and Permanent Injunctive Relief With Affidavit (dated May 21, 2006). The Court issued a Memorandum Opinion and Order addressing those filings on June 6, 2006. In its June 6, 2006 Memorandum Opinion and Order, the Court ordered temporary, rather than permanent, discipline for Respondent Gany Mike Bello, because the appellate process had not yet run its course in *Drain v. Accredited Home Lenders. Inc.*, No. CIV 04-399 (D.N.M.) (Vasquez, C.J.), *aff'd* No. 06-2096, 219 Fed. Appx. 791, 2007 WL 756438 (10th Cir. March 14, 2007), one of the matters in which Mr. Bello was involved, about which the Court was concerned.

Mr. Bello appealed the Court's June 6, 2006 order. On March 14, 2007, the United States Court of Appeals for the Tenth Circuit issued an opinion affirming Chief Judge Vasquez's dismissal of a case in which Mr. Bello represented the plaintiffs as sanction for violating a discovery order and imposition of rule 11 sanctions against Mr. Bello. *See Drain v. Accredited Home Lenders, Inc.*, No. 06-2096, 219 Fed.Appx. 791, 2007 WL 756438 (10th Cir. March 14, 2007). The Tenth Circuit also affirmed the June 6, 2006 Memorandum Opinion and Order. *See In re: Gany Mike Bello. Esq.*, No. 06-2199, 2007 WL 1821034 (10th Cir. June 26, 2007). Accordingly, the Court will now make permanent the discipline it instituted for Mr. Bello in its June 6, 2006 Memorandum Opinion and Order.

IT IS ORDERED that Mr. Bello is suspended from the practice of law in the United States District Court for the District of New Mexico except that he may continue to practice under the following conditions: (i) Mr. Bello must associate with a licensed attorney who is authorized to practice in, and is fully in good standing with, the United States District Court for the District of New Mexico; (ii) Mr. Bello may not file any pleading in the United States District Court for the District of New Mexico unless it has been reviewed, approved, and signed, as to form only, by an associate attorney as described above; and (iii) Mr. Bello must pay the attorney with which he associates that attorney's ordinary hourly rate for all work the attorney reviews. This suspension is indefinite and continuing unless removed by the Court upon motion by Bello, which he will not be able to submit until three years after the beginning of his suspension.

/s/
UNITED STATES DISTRICT JUDGE

/s/
SENIOR UNITED STATES DISTRICT JUDGE

/s/
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 06-2199
(D.C. Misc. No. 2006-06)
(D. N.M.)

[Filed June 26, 2007]

In Re:	)
GANY MIKE BELLO, ESQ.,	)
Appellant.	)
	)

ORDER AND JUDGMENT*

Before **BRISCOE**, **McKAY**, and **GORSUCH**, Circuit Judges.

* After examining appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

The United States District Court for the District of New Mexico suspended attorney Gany Mike Bello for unprofessional conduct, a decision Mr. Bello now appeals to us arguing that the district court exceeded its authority and failed to afford him due process. Following a careful review of the record, we conclude that the district court acted in accord with its rules and inherent authority, and that it afforded Mr. Bello generous notice and repeated opportunities to be heard. Accordingly, we affirm.

I

Mr. Bello is an attorney who was, as of 2004, admitted to practice in the United States District Court for the District of New Mexico. In that capacity, he appeared before the court as counsel in two civil matters giving rise to the current disciplinary proceedings, No. 04-CV-271, *Wheeler v. American Heritage Bank*, and No. 04-CV-399, *Drain v. Wells Fargo Bank*. In the course of his representation, according to the district court, Mr. Bello consistently and over a period of two years behaved abusively toward opposing counsel and the court alike. While a full appreciation of the charges against him can be had only by examining the district court's decisions, *Wheeler*, No. 04-CV-271 (D. N.M. Oct. 29, 2004) (dismissing complaint with prejudice), *Drain*, No. 04-CV-399 (D. N.M. Mar. 2, 2006) (same), and our own in *Drain*, No. 06-2096, 2007 WL 756438 (10th Cir. Mar. 14, 2007) (unpublished), it suffices to report here that Mr. Bello's alleged conduct extended well beyond the pale of zealous advocacy and involved making unfounded charges against opposing counsel, disregarding court orders, misrepresenting relevant

facts and law, and exhibiting a profound lack of respect for the judicial process. When it determined that Mr. Bello was unresponsive to lesser sanctions, the district court dismissed both *Wheeler* and *Drain* with prejudice.

After the cases were dismissed, the district judge presiding over the *Drain* litigation directed Mr. Bello to show cause before a three-judge disciplinary panel why his privilege to practice in the District of New Mexico should not be revoked. Mr. Bello responded by asking the court to enjoin disciplinary proceeding because *Drain* (decided by this court in March 2007) was then still pending on appeal. The court declined to do so, however, and it eventually suspended him. Still, the court acknowledged "that the appellate process ha[d] not run its course," and it therefore decided "not [to] enter a permanent discipline until the appellate process ha[d] finished." Aplt. App. at 92. In the interim, and "[u]ntil further ordered," the terms of the court's suspension order precluded Mr. Bello from practicing before it unless he "associate[d] with a licensed attorney who is authorized to practice in, and fully in good standing with, the United States District Court for the District of New Mexico." *Id.* Mr. Bello was also restricted from filing any pleading "unless it ha[d] been reviewed, approved, and signed as to form only by [the described] associate attorney." *Id.* Additionally, the court ordered Mr. Bello to pay any such attorney his or her hourly rate for all work reviewed.

On appeal, Mr. Bello argues that the district court (1) exceeded its authority to suspend him, and (2) violated his right to due process by giving him

inadequate notice of the allegations against him and denying him an opportunity to respond to those allegations.

II

Before addressing the merits of this, or any, appeal, we must of course first cross the threshold issue of our jurisdiction. Generally, courts of appeals have jurisdiction only over final decisions of the district courts. 28 U.S.C. § 1291; *United States v. Dickstein*, 971 F.2d 446, 447-48 (10th Cir. 1992). Attorney discipline orders, including suspensions from practice, however, have long been treated as qualifying final decisions. *In re Martin*, 400 F.3d 836, 840-41 (10th Cir. 2005); *Mattox v. Disciplinary Panel of U.S. Dist. Court for Dist. of Colo.*, 758 F.2d 1362, 1364 (10th Cir. 1985). In this case, the district court held Mr. Bello suspended "[u]ntil further ordered." Aplt. App. at 92. This language is materially indistinguishable from the language employed by the district court in *Mattox*, where we found jurisdiction over an order suspending an attorney "for an indefinite period of time and until further Order of the Court." 758 F.2d at 1364 (quotation and brackets omitted). Coupling this with the fact that the suspension already imposed on Mr. Bello has a definite effect on his professional reputation, which is generally sufficient to support appellate jurisdiction, *cf Butler v. Biocore Med. Techs., Inc.*, 348 F.3d 1163, 1168-69 (10th Cir. 2003), we are satisfied that jurisdiction exists to consider this appeal. We therefore proceed to its merits, mindful that the district court's decision to suspend Mr. Bello is reviewed for an abuse of discretion. *In re Martin*, 400 F.3d at 841.

III

1. The district court's suspension order was predicated on a local rule providing that "[t]he Court, *sua sponte* or upon recommendation by the State Bar of New Mexico Disciplinary Board, may discipline, suspend or disbar an attorney under D.N.M.LR-Civ. 83.9."[1] D.N.M.LR-Civ. 83.10. Though not entirely clear from his brief, Mr. Bello seems to suggest that the district court improperly exceeded its authority under D.N.M.LR-Civ. 83.10 by disciplining him for simply failing to understand the rules of practice.

Mr. Bello's argument misconstrues the authority of federal courts to regulate the practice of attorneys before them. The District of New Mexico has "inherent supervisory power" over the conduct of attorneys appearing in its courtrooms, *United States v. Ryans*, 903 F.2d 731, 734 n.4 (10th Cir. 1990), and this power includes the ability "to control admission to its bar and to discipline attorneys who appear before it," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). The district court exercised its authority under D.N.M.LR-Civ. 83.10 to suspend Mr. Bello for a host of lawful reasons, perhaps the least of which was his apparent ignorance (or disregard) of basic practice rules.

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[1] "The Rules of Professional Conduct adopted by the Supreme Court of the State of New Mexico apply except as otherwise provided by local rule or by Court order. *See, e.g.*, D.N.M.LR-Civ. 83.4(c). Lawyers appearing in this District must comply with the section for lawyers of 'A Creed of Professionalism of the New Mexico Bench and Bar.'" D.N.M.LR-Civ. 83.9.

2. Mr. Bello further contends he was denied due process because the district court's show cause order did not "include any exhibits []or contain any attachments," "was void of any specific fact[] allegations," and "was conclusory and failed to provide due process notice of what the specific charges [were] against" him. Aplt. Br. at 13.

To be sure, an attorney subject to disciplinary proceedings is entitled to procedural due process. *Razatos v. Colo. Supreme Court*, 746 F.2d 1429, 1435 (10th Cir. 1984). Although this does not necessitate the provision of "the full panoply of rights afforded to an accused in a criminal case," *id.* (quotation omitted), an attorney subject to discipline is entitled to receive reasonable notice of the allegations against him and an opportunity to respond, *Mattox*, 758 F.2d at 1368-69. That manifestly occurred here.

The district court first directed Mr. Bello on January 25, 2006, to show cause why his privilege to practice in that court should not be revoked. The court's order proceeded, moreover, to specify the matters on which he needed to respond – alleging that he "lacks a basic understanding of the rules of practice, abuses opposing counsel with specious charges and allegations and lacks respect for the judicial tribunal." Aplt. App. at 3. The court also gave Mr. Bello an opportunity to respond at a hearing scheduled more than a month later, on February 28, 2006. When Mr. Bello filed a request for more information, the court duly postponed the hearing for nearly another month, until March 22, 2006, and advised him that the information to be considered by the disciplinary panel

would include court records from the *Wheeler* and *Drain* litigation.

The day of the already-postponed hearing, Mr. Bello faxed to the court a request to enjoin the proceeding on the basis that he had been given supposedly inadequate notice of the allegations against him. Although the court promptly notified him that his request for an injunction would be heard immediately before the show cause hearing, Mr. Bello failed to appear.

On April 12, 2006, the court issued a ruling declining to enjoin the disciplinary proceedings and provided a forty-three page memorandum detailing further the factual basis of its earlier show cause order. The court then scheduled yet another show cause hearing, this time for May 22, 2006, at which it invited Mr. Bello to respond to its detailed description of his conduct. Once again, Mr. Bello did not appear. Instead, he repeated his request for injunctive relief. Finally, on June 6, 2006, the district court again denied Mr. Bello's request for injunctive relief and issued its order of suspension.

Given the court's prodigious efforts over a five month period to inform Mr. Bello of the allegations against him and provide him multiple opportunities to be heard, both in writing and orally (in the latter case, three times, all of which were declined), Mr. Bello's

assertion that he did not receive the process due him can be described as nothing short of frivolous.[2]

* * *

The judgment of the district court is affirmed.

Entered for the Court

Neil M. Gorsuch
Circuit Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 06-2096
(D.C. No. CIV-04-399 MV/KBM)
(D.N.M)

[Filed May 3, 2007]

JAMES DRAIN and RACHEL DRAIN,
Plaintiffs - Appellants,

v.

ACCREDITED HOME LENDERS INC.;
BASMAJIAN T. DOYLE, Director;
WELLS FARGO BANK, MINNESOTA,
N.A., as Trustee for ITLA Mortgage,
Loan Securitization 2002-1, LLC;
FAIRBANKS CAPITAL CORP., UTAH,
Defendants-Appellees.

ORDER

Filed May 3, 2007

Before **KELLY, ALARCON*** and **LUCERO,** Circuit Judges.

Pending before the court is "Appellees Fairbanks and Wells Fargo's Bill of Costs," "Appellees Fairbanks', Wells Fargo's and Basmajian's Motion for Attorney Fees and Double Costs," and "Appellant's Response to Appellees Fairbanks', Wells Fargo's and Basmajian's Motion for Attorney Fees and Double Costs."

The appellees' bill of costs requests costs appropriately assessable under Fed. R. App. P. 39. Accordingly, we tax costs against the appellant and in favor of the appellees Fairbanks Capital Corporation (now known as Select Portfolio Servicing, Inc.) and Wells Fargo Bank, Minnesota, NA (now known as Wells Fargo Bank, N.A) in the amount of $294.48. Fed. R. App. P. 39(a)(2).

With regard to the motion to assess attorneys' fees and double costs, we find that this appeal was objectively frivolous and that the attorney who represented the appellants, Mike Bello, multiplied the proceedings unreasonably and vexatiously in prosecuting this appeal. *See* Fed. R. App. P. 38, 28 U.S.C. § 1927. We therefore grant the motion seeking double costs and the assessment of attorneys' fees as provided herein.

* The Honorable Arthur L. Alarcón, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

Attorney Mike Bello is ordered to personally pay to the appellees: (1) $294.48 as a double assessment of costs; and (2) the reasonable attorneys' fees incurred by the appellees in defending this appeal; and (3) the reasonable expenses incurred by the appellees in defending this appeal.

We remand to the U.S. District Court for the District of New Mexico for determinations of the reasonable attorneys' fees and expenses incurred in defending the appeal and any other matters related to this award of fees and expenses.

A copy of this order shall stand as a supplement to the mandate of this court.

Entered for the Court
ELISABETH A. SHUMAKER
Clerk of Court

by: /s/
Douglas E. Cressler
Chief Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MISCELLANEOUS NO: 2006-06

[Filed June 6, 2006]

IN RE: THE MATTER OF)
GANY MIKE BELLO, ESQ.)
)

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on: (I) the Court's Notice of Order to Show Cause and Order to Appear, Misc. No. 2006-06, filed April 13, 2006; and (ii) Respondent's Motion for Preliminary and Permanent Injunctive Relief With Affidavit (dated May 19, 2006). The Court convened for a hearing on the Show Cause order on May 22, 2006, but Respondent Gany Mike Bello did not appear. The primary issue is whether the Court should stay the show cause proceeding, and stay any disciplinary ruling until after the appellate process ends. The Court will deny the motion for preliminary and permanent injunctive relief, and will not stay the show cause proceeding. The Court will, however, issue only a temporary disciplinary ruling and will not issue a permanent ruling until after the appellate process has run.

FACTUAL BACKGROUND

1. Wheeler v. American Heritage Bank & Sellers.

On August 17, 2004, The Honorable Lorenzo F. Garcia, Chief United States Magistrate Judge, issued a Memorandum Opinion and Order directing compliance with discovery obligations and imposing sanctions in *Wheeler v. American Heritage Bank & Sellers*, CIV 04-271 WPJ/LFG. *See* Memorandum Opinion and Order Directing Compliance with Discovery Obligations and Imposing Sanctions, filed August 17, 2004 (Doc. 34). Chief Magistrate Judge Garcia determined that Mr. Bello's conduct was sanctionable, imposed the sanction of attorney fees that the Defendants incurred in their effort to secure compliance with disclosure requirements, and directed that Wheeler fully comply with D.N.M.LR-Civ. 26.3(d) within ten days, as well as make all other disclosures under rule 26 within the same ten-day period. *See id.* at 4-8. Chief Magistrate Judge Garcia's order concluded: "Failure to comply with this Court's explicit directive can result in imposition of additional sanctions, including dismissal of Ms. Wheeler's case with prejudice. *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992)." *Id.* at 8.

On October 6, 2004, Chief Magistrate Judge Garcia issued a Memorandum Opinion Recommending Dismissal With Prejudice in *Wheeler v. American Heritage Bank & Sellers*, CIV 04-271 WPJ/LFG (Doc. 49). Chief Magistrate Judge Garcia's Memorandum Opinion sets out the chronology of the case and key rulings, and also includes an *Ehrenhaus v. Reynolds*

analysis. *See id.* at 4-8. Chief Magistrate Judge Garcia recommended that the trial judge enter an order dismissing Wheeler's lawsuit with prejudice as a discovery sanction, finding authorization in the Tenth Circuit's recent decision in *Ashby v. McKenna*, No. 03-1464, 2004 WL 2106540 (10th Cir. Sept. 22, 2004). *See id.* at 8. On October 29, 2004, the Honorable William P. Johnson, United States District Judge, entered an order accepting Chief Magistrate Judge Garcia's recommendations. *See* Order Adopting Magistrate Judge's Recommended Disposition and Dismissing Case (Doc. 53). Judge Johnson concluded that Wheeler failed to comply with the district's local rules as well as with rule 26 of the Federal Rules of Civil Procedure, and that the United States Court of Appeals for the Tenth Circuit had previously determined that the failure to produce disclosures could result in dismissal of the plaintiff's case. *See id.* at 3 (citing *Ashby v. McKenna*, 2004 WL 2106540). Judge Johnson ultimately found good cause to accept Chief Magistrate Judge Garcia's recommendation, and Judge Johnson dismissed the case with prejudice on October 29, 2004. *See* Order Adopting Magistrate Judge's Recommended Disposition and Dismissing Case at 3-4.

Mr. Bello did not file an appeal in the Tenth Circuit to challenge Judge Johnson's October 29, 2004 dismissal order and the related final judgment. *See Wheeler v. Am. Heritage Bank*, No. 04-2251, 2006 U.S. App. LEXIS 9231, at *4 (10th Cir. April 11, 2006). The time to file a timely notice of appeal of the final judgment has run. Instead, Mr. Bello did two things: (1) on September 1, 2004, he filed timely objections under rule 72(a) of the Federal Rules of Civil

Procedure to Chief Magistrate Judge Garcia's August 17, 2004 Memorandum Opinion and Order that directed compliance with discovery obligations and imposed sanctions; he did not seek to stay Chief Magistrate Judge Garcia's order; and (ii) on September 17, 2004, before the district judge had ruled on his rule 72(a) objections, Mr. Bello filed a "Notice of Appeal" in the Tenth Circuit, stating that he was appealing from the magistrate judge's August 17, 2004 order. *See id.* at *4-5. The Tenth Circuit dismissed Mr. Bello's appeal because it found that it did not have jurisdiction to consider Mr. Bello's objections to Chief Magistrate Judge Garcia's August 17, 2004 order. *See id.* at *5-6.

2. Drain v. Wells Fargo Bank et al.

On December 16, 2005, the Honorable Karen Molzen, United States Magistrate Judge, filed Proposed Findings and Recommended Disposition on sanctions in *Drain v. Wells Fargo Bank et al.*, CIV 04-399 MV/KBM, recommending that the case be dismissed with prejudice as a sanction pursuant to rule 37 of the Federal Rules of Civil Procedure for discovery violations. *See* Proposed Findings and Recommended Disposition (Doc. 220). On March 1, 2006, after conducting an independent *Ehrenhaus v. Reynolds* analysis, Chief Judge Vazquez dismissed the case with prejudice as a sanction pursuant to Federal Rule of Civil Procedure 37 for discovery violations. *See* Doc. 228. The Plaintiffs in *Drain v. Wells Fargo Bank et al.* appealed the dismissal of their case to the Tenth Circuit, where the appeal is pending. *See* Plaintiffs' Notice of Appeal to the Tenth Circuit Court of Appeals, filed March 31, 2006 (Doc. 232).

PROCEDURAL BACKGROUND

On January 25, 2006, Chief Judge Vazquez entered, pursuant to D.N.M.LR-Civ. 83.10, an Order to Show Cause and Order to Appear. *See* Order to Show Cause and Order to Appear, Misc. No. 2006-06. Mr. Bello was the attorney of record in both *Wheeler v. American Heritage Bank & Sellers,* CIV 04-271 WPJ/LFG, and *Drain v. Wells Fargo Bank et al.*, CIV 04-399 MV/KBM, and his representation throughout both cases was the basis for Chief Judge Vazquez' order to show cause. Chief Judge Vazquez stated that she had determined that Mr. Bello lacks a basic understanding of the rules of practice, abuses opposing counsel with specious charges and allegations, and lacks respect for the judicial tribunal. *See* Order to Show Cause and Order to Appear at 1. She determined that there appears to be good cause for issuance of the order to show cause. *See id.*[1]

Chief Judge Vazquez directed that Mr. Bello would come before three Article III judges sitting en banc to show cause, if any he has, why the Court should not revoke his privileges to practice in the United States District Court for the District of New Mexico. *See id.*; *Mattox v. Disciplinary Panel of United States Dist. Court*, 758 F.2d 1362 (10th Cir. 1985)(reviewing a federal three-judge panel's denial of readmission to the bar of that court). She stated that Mr. Bello may submit written documentation to the Court before the

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[1] The Court's Memorandum Opinion and Order, filed April 12, 2006, more fully presents the factual and procedural background that form the basis of this show cause proceeding.

hearing if he so desired. *See id.* She also scheduled the hearing for February 28, 2006. *See id.*

On February 13, 2006, Mr. Bello filed a request for information. *See* Respondents Request for Information, Misc. No. 2006-06. In that document, Mr. Bello submitted a request for specific information consisting of facts and allegations, evidences and records, to enable him to prepare his defense in accordance with due process. *See id.* at 1-2. Specifically, Mr. Bello requested all facts and allegations, including evidence and record, supporting the determination that he lacks a basic understanding of the rules of practice, that he abuses opposing counsel with specious charges and allegations, and that he lacks respect for the judicial tribunal. *See id.* ¶¶ 1-3, at 1.

On February 23, 2006, Mr. Bello sought a continuance. *See* Motion for Continuance, Misc. No. 2006-06. He asked the Court to reset the hearing for a later date to allow him the opportunity to file an answer upon his receipt of the necessary and essential facts, evidence, and specific allegations from the Court. *See id.* at 1. He stated that he had received Chief Judge Vazquez' order to show cause on February 2, 2006 and stated that due process required that the Court confront him with the facts and allegations against which he is being asked to defend. *See id.*

On February 23, 2006, the Honorable James A. Parker, Senior United States District Judge, entered an order addressing Mr. Bello's request for information. Judge Parker stated:

> Mr. Bello is hereby advised that the information which the panel will consider at the time of the hearing on the Order to Show Cause appears in the court records in *Wheeler v. American Heritage Bank and Bob Sellers*, Civ. No. 04-0271 WPJ/LFG, and *James Drain and Rachel Drain v. Wells Fargo Bank, Minnesota, N.A. et al.*, Civ. No. 04-0399 MV/KBM. The panel will consider all papers, pleadings, memoranda, reports, orders, and decisions, as well as all transcripts of proceedings and clerk's minutes.

Order at 1. Judge Parker also vacated the February 28, 2006 hearing and stated that the hearing would be reset at a future date. *See id.*

On March 7, 2006, Chief Judge Vazquez filed another notice of order to show cause, setting the hearing for 11 :00 a.m. on March 22, 2006. *See* Notice of Order to Show Cause and Order to Appear, Misc. No. 2006-06. On March 21, 2006, Mr. Bello filed his objections and answers. *See* Respondent's Objections and Answer, Misc. No. 2006-06. Mr. Bello argued that the Order to Show Cause and to Appear was unconstitutional and violated due process, because it failed to provide any notice as to the specific facts on which the allegations are based. *See id.* at 1. Citing *In re Ruffalo*, 390 U.S. 544, 550-551 (1968), Mr. Bello asserted that the Court should not subject him to uncertainty in defending his privilege to practice in this District. *See id.* at 2.

On March 22, 2006, Mr. Bello sent to the Court, by facsimile transmission, copies of Respondent's Motion

for Injunctive Relief with Affidavit. *See* Respondent's Motion for Injunctive Relief with Affidavit, Misc. No. 2006-06. Mr. Bello argued that injunctive relief was necessary to protect his constitutional right to due process. *See id.* at 1-5. He again argued that the scheduled hearing would violate his right to be informed of the nature and cause of the accusation against him, and to be confronted with the witnesses against him. *See id.*

The Court sent notice by facsimile transmission to Mr. Bello indicating that it had received the Respondent's Motion for Injunctive Relief with Affidavit. The Court notified Mr. Bello that it would hear his motion for injunctive relief immediately before the hearing on the Order to Show Cause. *See* Fax Transmittal Sheet; Notice of Hearing, Misc. No. 2006-06. Mr. Bello did not appear at the March 22, 2006 hearing on the order to show cause.

Nevertheless, to comply with Mr. Bello's request for all facts and allegations, including evidence and records, supporting the determination that he lacks a basic understanding of the rules of practice, abuses opposing counsel with specious charges and allegations, and lacks respect for the judicial tribunal, the Court set forth in detail its notice to Mr. Bello in a Memorandum Opinion and Order, filed April 12, 2006. Mr. Bello did not appear at the show cause hearing scheduled for May 22, 2006. On May 22, 2006, Mr. Bello sent to the Court, by facsimile transmission, Respondent's Motion for Preliminary and Permanent Injunctive Relief With Affidavit, as well as Respondent's Answers and Objections to Memorandum Opinion and Order of April 12, 2006.

LAW REGARDING INJUNCTIVE RELIEF

To obtain a permanent injunction, the party requesting such relief bears the burden of showing: "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003)(citations omitted). To obtain a preliminary injunction, a plaintiff must show: "(1) a substantial likelihood of success on the merits, (2) that the plaintiff will suffer irreparable injury if the preliminary injunction is denied, (3) that the threatened injury to the plaintiff outweighs the injury to the defendant(s) caused by the preliminary injunction, and (4) that an injunction is not adverse to the public interest." *Aid for Women v. Foulston*, No. 04-3310, 2006 U.S. App. LEXIS 2366, at *32 (10th Cir. January 27, 2006)(citation omitted). The right to relief under a preliminary injunction "must be clear and unequivocal." *Id.* at *32-33 (citation and internal quotations omitted).

LAW REGARDING DISCIPLINING ATTORNEYS

D.N.M.LR-Civ. 83.9 provides:

> The Rules of Professional Conduct adopted by the Supreme Court of the State of New Mexico apply except as otherwise provided by local rule or by Court order. *See, e.g.*, D.N.M.LR-Civ. 83.4(c). Lawyers appearing in this District

> must comply with the section for lawyers of "A Creed of Professionalism of the New Mexico Bench and Bar."

D.N.M.LR-Civ. 83.9 pertains to attorney discipline and provides in relevant part: **"(a) Disbarment or Suspension of an Attorney.** The Court, *sua sponte* or upon recommendation by the State Bar of New Mexico Disciplinary Board, may discipline, suspend or disbar an attorney under D.N.M.LR-Civ. 83.9." Federal courts have "inherent supervisory power over the attorneys practicing before them." *United States v. Ryans*, 903 F.2d 731, 735 n.4 (10th Cir. 1990). "Courts have long recognized an inherent authority to suspend or disbar lawyers. This inherent power derives from the lawyer's role as an officer of the court which granted admission." *In re Snyder*, 472 U.S. 634, 643 (1985).

ANALYSIS

The Court will deny Mr. Bello's motion for injunctive relief. "This request [for the court to enjoin itself] is extraordinary." *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 699 (D.N.J. 1989).

Even assuming that a court can or should enjoin itself, Mr. Bello has not shown the Court why he is likely to succeed on the merits, but rather stated in conclusory fashion that "since the issues are still under review in the higher courts and there is likelihood of success for the merits on those cases, the result which would render these allegation [sic] moot." Respondent's Motion for Preliminary and Permanent Injunctive Relief with Affidavit at 3. He further states

that "the likelihood of success in the merits of the cases and later success would render all of the same allegations and conclusions this tribunal based its prosecution on as moot." *Id.* at 6. A number of judges, however, now have reviewed the two matters he has had before the Court and concluded that he lacks a basic understanding of the rules of practice, abuses opposing counsel with specious charges and allegations, and lacks respect for the judicial tribunal.

The Court also does not believe that Mr. Bello has shown that irreparable harm will occur to him if the Court does not cease these proceedings. While the privilege of practicing in federal court is precious, Mr. Bello has the right to appeal any disciplinary measure that the Court decides to impose. *See United States v. Rohm & Haas Co.*, 721 F. Supp. at 699 ("If our entry of this decree is improper and deprives Manor Health of legal rights to which it is entitled, then the Court of Appeals will not hesitate to upset our ruling. This avenue of relief defeats any claim that Manor Health will be 'irreparably harmed' if we enter this decree."). Moreover, Mr. Bello has not pointed to any cases that he has pending in the District of New Mexico or that he intends to file, and thus there is not evidence before the Court that any order will harm him at all.

Mr. Bello has not shown that any harm he will suffer if the Court does not enjoin itself substantially outweighs the harm that will occur if the Court does enjoin itself. The Court has dismissed both of his clients' cases. Again, he can appeal whatever decision the Court imposes, but the Court and Mr. Bello's potential clients will suffer great harm if the Court is

not allowed to discipline the attorneys that practice before it.

Finally, the Court believes that the public's interest greatly outweighs Mr. Bello's personal interest in this matter. While the right to represent persons in federal court can be professionally and financially rewarding, the rights of the litigants and of the public are paramount in this situation. The record of the two cases before the Court suggests that Mr. Bello did not serve his clients well, and the Court cannot long endure a single attorney with two cases taking so much of its judicial resources and energy.

Accordingly, Mr. Bello has not met the requirements for injunctive relief. The Court will not grant his request that the Court enjoin itself.

The Court has given Mr. Bello ample notice of the basis for the charges against him, and has given him an opportunity to appear before the Court to present his case; he chose not to appear before the Court and the Court will proceed.

Based on the circumstances fully laid out in the Court's Memorandum Opinion and Order, filed April 12, 2006, and after reviewing Respondent's Answers and Objections to Memorandum Opinion and Order of April 12, 2006, the Court believes that discipline and supervision is warranted and necessary in this case to protect the public and to uphold the integrity of the legal profession and the judiciary. The Court does, however, have some concern that the appellate process has not run its course. Because of the Court's concern, it will temporarily discipline Mr. Bello until the

Appellate process has run its course. Until further ordered, Mr. Bello is suspended from the practice of law in the United States District Court for the District of New Mexico except that he may continue to practice under the following conditions: (i) Mr. Bello must associate with a licensed attorney who is authorized to practice in, and fully in good standing with, the United States District Court for the District of New Mexico; (ii) Mr. Bello may not file any pleading in the United States District Court for the District of New Mexico unless it has been reviewed, approved, and signed as to form only by an associate attorney as described above; and (iii) Mr. Bello must pay the attorney with which he associates that attorney's ordinary hourly rate for all work that attorney reviews.

The Court will not enter a permanent discipline until the appellate process has finished.

IT IS ORDERED that Respondent's Motion for Preliminary and Permanent Injunctive Relief With Affidavit is denied. The Court will discipline Mr. Bello, but such discipline will only be temporary at this time. Mr. Bello is suspended from the practice of law in the United States District Court for the District of New Mexico except that he may continue to practice under the following conditions: (i) Mr. Bello must associate with a licensed attorney who is authorized to practice in, and fully in good standing with, the United States District Court for the District of New Mexico; (ii) Mr. Bello may not file any pleading in the United States District Court for the District of New Mexico unless it has been reviewed, approved, and signed as to form only by an associate attorney as described above; and (iii) Mr. Bello must pay the attorney with

which he associates that attorney's ordinary hourly rate for all work that attorney reviews.

/s/
UNITED STATES DISTRICT JUDGE

/s/
SENIOR UNITED STATES DISTRICT JUDGE

/s/
SENIOR UNITED STATES DISTRICT JUDGE

Stetson Law -- New Mexico Bar, A Lawyer's Creed of Professionalism

http://www.law.stetson.edu/excellence/litethics/newmexicobar.htm

A Lawyer's Creed of Professionalism of the State Bar of New Mexico

Preamble

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Creed of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

A. In all matters:

"My Word is My Bond."

B. With respect to my client:

1. I will be loyal and committed to my client's cause, but I will not permit that loyalty and commitment to interfere with my ability to provide my client with objective and independent advice;

2. I will endeavor to achieve my client's lawful objectives in business transactions, in

litigation and in all other matters, as expeditiously and economically as possible;

3. In appropriate cases, I will counsel my client with respect to mediation, arbitration and other alternative methods of resolving disputes;

4. I will advise my client against pursuing any course of action that is without merit and against insisting on tactics which are intended to delay resolution of the matter or to harass or drain the financial resources of the opposing party;

5. I will advise my client that civility and courtesy are not to be equated with weakness;

6. While I must abide by my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

7. I will keep my client informed about the progress of the case and the costs and fees being incurred;

8. I will charge only a reasonable attorney's fee for services rendered;

9. I will be courteous to and considerate of my client at all times.

C. With respect to opposing parties and their counsel:

1. I will endeavor to be courteous and civil, both in oral and in written communications;

2. I will not knowingly make statements of fact or of law that are untrue;

3. In litigation proceedings I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

4. I will endeavor to consult with opposing counsel before scheduling depositions and meeting and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

5. I will refrain from utilizing litigation, delaying tactics, or any other course of conduct to harass the opposing party;

6. I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

7. In depositions and other proceedings, and in negotiations, I will conduct myself with

dignity, avoid making groundless objections and refrain from disrespect;

8. I will not serve motions and pleadings on the other party, or his counsel, at such a time or in such a manner as will unfairly limit the other party's opportunity to respond;

9. In the preparation of documents and in negotiations, I will concentrate on matters of substance and content;

10. I will clearly identify, for other counsel or parties, all changes that I have made in documents submitted to me for review.

D. With respect to the courts and other tribunals:

1. I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

2. Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

3. I will voluntarily withdraw claims or defenses when it becomes apparent that they do not have merit or are superfluous;

4. I will refrain from filing frivolous motions;

5. I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

6. I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

7. When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and, if appropriate, the court (or other tribunal) as early as possible;

8. Before dates for hearings or trials are set – or, if that is not feasible, immediately after such dates have been set – I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

9. In civil matters, I will stipulate to facts as to which there is no genuine dispute;

10. I will be punctual in attending court hearings, conferences and depositions;

11. I will at all times be respectful toward and candid with the court;

12. I will avoid the appearance of impropriety.

E. With respect to the public and to our system of justice:

1. I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

2. I will endeavor to keep myself current in the areas in which I practice and, when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

3. I will be mindful of my obligation, as a member of a self-regulating profession, to be an active participant, when appropriate, in the disciplinary process;

4. I will be mindful of the need to protect the image of the legal profession in the eyes of the public and particularly will be so guided when considering methods and contents of advertising or other public communications;

5. I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance.

Back to Codes of Professional Ethics

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ. No. 04-0399 MV/KBM

[Filed March 28, 2006]

JAMES DRAIN and RACHEL DRAIN, *et al.*,
Plaintiffs,

vs.

WELLS FARGO BANK, MINNESOTA, NA, as TRUSTEE for ITLA MORTG., LOAN SECURITIZATION 2002-1,LLC, and ACCREDITED HOME LENDERS INC., and FAIRBANKS CAPITAL CORP., UTAH and its Director, BASMAJIAN T. DOYLE,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendants/Counter-Plaintiffs Fairbanks Capital Corp. and Wells Fargo Bank's Motion for Clarification of Order, filed March 9, 2006, **[Doc. No. 230]**. In their motion, Defendants/Counter-Plaintiffs seek to clarify that the March 2, 2006 Amended Memorandum Opinion and Order that dismissed Plaintiffs' claims

with prejudice as a sanction did not dismiss Defendants/Counter-Plaintiffs' counterclaims. In their motion, Defendants/Counter-Plaintiffs stipulate to the dismissal without prejudice of their counterclaims. Plaintiffs did not file a response to this motion.

IT IS THEREFORE ORDERED that Defendants/Counter-Plaintiffs Fairbanks Capital Corp. and Wells Fargo Bank's Motion for Clarification of Order, filed March 9, 2006, **[Doc. No. 230]** is **GRANTED.** It is hereby clarified that the Court's March 2, 2006 Amended Memorandum Opinion and Order did not dismiss Defendants/Counter-Plaintiffs Fairbanks Capital Corp. and Wells Fargo Bank's counterclaims.

IT IS FURTHER ORDERED that Defendants/Counter-Plaintiffs Fairbanks Capital Corp. and Wells Fargo Bank's counterclaims are hereby dismissed without prejudice.

Dated this 28th day of March, 2006.

/s/
MARTHA VÁZQUEZ
U.S. DISTRICT COURT JUDGE

Attorney for Plaintiffs:
Mike Bello, Esq.

Attorneys for Defendants:
Cynthia Tessman, Esq.
Dylan O'Reilly, Esq.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MISCELLANEOUS NO: 2006-06

[Filed January 25, 2006]

IN RE: THE MATTER OF	)
GANY MIKE BELLO, ESQ.	)
	)

ORDER TO SHOW CAUSE AND ORDER TO APPEAR

THIS MATTER comes before the Court pursuant to D.N.M.LR-Civ 83.10. The Court has determined that Gany Mike Bello, Esq. lacks a basic understanding of the rules of practice, abuses opposing counsel with specious charges and allegations and lacks respect for the judicial tribunal. The Court finds there appears to be good cause for issuance of this Order to Show Cause.

Therefore, Gany Mike Bello, Esq., shall come before The Honorable John Edwards Conway, The Honorable James A. Parker and The Honorable C. Leroy Hansen, sitting *en banc,* to show cause, if any he has, as to why his privileges to practice in this Court should not be revoked.

Mr Bello may submit written documentation to the Court prior to the hearing if he so desires.

The hearing is scheduled for Tuesday, February 28, 2006 at 3:00 p.m. in the United States Courthouse at 421 Gold Avenue, SW, Sixth Floor, Albuquerque, New Mexico.

BY THE COURT:

/s/

MARTHA VÁZQUEZ, Chief Judge
United States District Court for the District of New Mexico

Inquiries regarding this setting may be directed to Lee Jones, Administrative Assistant to the Honorable John Edwards Conway, at (505) 348-2201.